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PERFORMANCE RELATED CLAUSES: STEMMING THE TIDE OF OVER-REACHING CLAUSES IN FOOTBALL CONTRACTS

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The relevant clauses in sports contracts are often a culmination of the interplay among individual employment and sponsorship contracts, league constitutions, tournament rules, and the collective bargaining agreements between owners and the players where applicable. Contract clauses have played a significant role in the growth of the sports industry and professional football in particular. The professional football industry in Nigeria has struggled with contract documentation over the years. From a complete lack of documentation to poorly drafted contract terms, it has been a sordid tale. Unfortunately, the challenges of commercialization of the sport have only served to complicate the simmering contractual issues between the players and their clubs resulting in untimely termination of the contractual relationship with neither party challenging the development in court. However, the emergence of uniform player contracts with standard contractual requirements has addressed to a considerable extent, some of the avoidable contract wrangles that have characterized professional football in Nigeria. Sadly, the quest to play professional football robs the unsuspecting player of the presence of mind to understand the key clauses in the contract before appending his signature. Most of the players either refuse to avail themselves of the services of a lawyer to explain the clauses in the contract or in a hurry to sign their professional contract.

Understanding and negotiating contract clauses in sports requires an understanding and appreciation of the inter-relationship between judicial decisions arising from the general principles of contract law on the one hand and the ever-evolving employment law practice on the other. This article, therefore, analyzes the statement credited to Plateau United Football Club General Manager stating that all the playing and coaching staff have been placed on half-salary following their dismal start to the season. We analyze the propriety of this action in the light of emerging employment law trends and the football jurisprudence. This analysis is firmly circumscribed within performance clauses in football.

The dynamics of the employment relationship

The law in Nigeria is that the relationship between a master and his servant or employer and his employee, is a contractual one and it is governed and regulated by the terms and conditions of the contract between them[1]. Generally, the rights, obligations, and liabilities of the parties to such a contract, are to be determined on the basis of the terms and conditions

[1] See NEPA v. Adesaaji (2002) 17 NWLR (797) 578: Momoh v. CBN (2007) 14 NWLR (1055) 504: Osakwe v. Nig. Paper Mill Ltd (1998) 10 NWLR (568) 1: PAN v. Oje (1997) 11 NWLR (530) 625

to which they have freely and voluntarily agreed to govern and regulate the relationship[2].

In addition, the law generally, does not permit a Court to alter, by subtraction or addition, or re-write the terms and conditions of a contract entered into by the parties, on the pretext of exercising a judicial discretion that completely ignores the sanctity of their agreement. It is widely recognized in the United Kingdom that an employment relationship is a special kind of contractual relationship that contains express and implied terms, obligations, and duties that may not be present in other types of contract.[3] In ***Braganza v BP Shipping and Another***,[4] a case which concerned an employer's refusal to pay a death in service benefit, the United Kingdom Supreme Court acknowledged that an employment contract is "*of a different character from an ordinary commercial contract*",[5] and "*had specialties that do not normally exist in commercial contracts*."[6]. In ***Braganza*** the UK Supreme Court referred to the "*significant imbalance of power between the contracting parties as there often will be in an employment contract*."[7] In ***Eastham v Newcastle United Football Club Ltd***[8] the English High Court referred to the inequality of bargaining power in a professional football player's relationship with a club. It highlighted the role of the Court as being to ensure that restrictive covenants agreed in circumstances of unequal bargaining power are reasonable.

The courts recognize that power disparities arise in an employment relationship and are relevant to the enforceability of a contract or contractual clause. Weaker bargaining power may undermine a party's ability to consent meaningfully to a contractual term. As earlier stated, freedom of contract is a fundamental tenet of contract law and the courts are usually reluctant to intervene in private contractual relations. But the principle is not absolute and for reasons of public policy the courts have on occasion intervened to prevent abuse of private power.[9] The nature of the intervention depends on the contractual terms and the context in which the power is being exercised. Much would, therefore, depend on the peculiar fact pattern of each case. The employment relationship represents one area where the court has been extremely circumspect in upholding certain provisions in an employment contract and in which power disparities have led the court to intervene to stop a wily employer from invoking certain over-reaching provisions in an employment contract. The

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[2] See Calabar Cement Co. Ltd v. Daniel (1991) 4 NWLR (188) 750: Katto v. CBN (1999) 6 NWLR (607) 390
[3] See *Autoclenz Ltd v Belcher and Others* [2011] UKSC 41 (SC).
[4] See *Braganza v BP Shipping Ltd and Another* [2015] UKSC 17.
[5] *Braganza*, *supra* n 5, para 32.
[6] *Braganza*, *supra* n 5, para 54.
[7] *Braganza*, *supra* n 5, para 18.
[8] [1964] Ch 413 (ChD).
[9] *Braganza, supra* n 5 (held an employer is obliged to exercise a contractual power of decision- making in good faith and not in an arbitrary, capricious, irrational or unreasonable manner), *Nordenfelt Ex p. Maxim Nordenfelt Guns and Ammunition Co, Re* [1895] 1 Q.B. 151 (HL), *Eastham, supra* n 14 and *Grieg v Insole* [1978] 1 W.L.R. 302 (ChD) (all held that a clause or rule in a private contract that unreasonably deprives an individual of the opportunity to earn a living and deprives the public of the benefit of the individual's labour may be contrary to public policy). *See also* Sedley 1994, Forsyth 1996 and Laws 1997.

sports industry is replete with cases where this commendable judicial attitude has been demonstrated.

The Nigerian labour/employment law context

The ILO Decent Work Agenda now prescribes 'social dialogue', which is essentially the same as what the National Industrial Court of Nigeria refers to as 'participatory democracy'. Both standards simply proscribe employers from unilaterally making material changes to an employment contract without recourse to the affected employees. Accordingly, where an employer intends to review employee benefits, the employer should negotiate the proposed changes with its employees, and have the agreed terms documented and signed by both parties. Any unilateral variation without the consent of the employee may be considered an unfair labour practice. More so, if the employee resigns as a result of a drastic change in the conditions of employment, the employer may, in the event of successful court action, be liable to pay damages to the employee for constructive dismissal.

Ordinarily, for a pay cut to arise, the employer will need to carry the employee along and negotiate the issue of pay cut with them. The negotiation must be transparent, and the worker must be allowed to voluntarily consent to a pay cut. Where an employer unilaterally applies a pay cut, the employee can do either of the following:

1. accept the variation in the salary payment;
2. reject the variation and sue for damages on constructive dismissal; and
3. express his rejection and continue to work; in which case the defendant will know his position and decide to either continue the original terms or to utilize its right of termination, in the terms provided by the contract.

The case of ***Tolulope Emmanuel Oyeyemi v Guardian Global Resources Ltd Suit No NICN/LA/372/2017*** **delivered on Thursday, May 24, 2018,** which facts occurred during the economic recession in Nigeria between 2015 to 2017, presents the guiding principles for remuneration adjustment when economic realities beckon. The court held that whereas it would have found that the cut in Claimant's salary and pensions and their non-payment would be a breach of the contract of employment between the parties for being unilateral; however, the behaviour of the claimant in the aftermath of the breach (salary cut) was such that the employee would be deemed to have accepted the change and the conditions under which it was made. Thus, it is paramount for an employer to act timeously and not do things that would be interpreted by the courts to mean a waiver and acquiescence in the occasion of a breach of contract by the employer. This is because it is trite that equity aids the vigilant and not the indolent.
In an opinion expressed by the Court of Chancery of the State of Delaware, of February 25th 2014, in the case **of *Lehman Brothers Holdings, Inc. v. Spanish Broadcasting System, Inc., Cons., C.A. No. 8321-VCG (Del. Ch. Feb. 25, 2014)***, the Court described elements that can lead to acquiesce to include:

1. the plaintiff remained silent;
2. with knowledge of her rights;
3. and with knowledge or expectation that the defendant would likely rely on her silence;
4. the defendant knew of the plaintiff's silence, and
5. the defendant in fact relied to her detriment on the plaintiff's silence.

In the case of ***Victor Browne v. Dana Airlines Limited Suit No: NICN/LA/245/2012*** **delivered on 2015-02-12,** the court gave a decision indicating the need for a party in a contract of employment to act promptly in situation of a material change in the contract.

The NPFL experience

The practice of inserting performance-related clauses in football contracts is gradually gaining wide acceptance in the Nigerian Premier Football Club. However, whilst performance-related bonuses for improved team performance is an acceptable practice, a corresponding reduction of players' salaries for poor performance, is not. For instance, sometime in 2021, Plateau United Football Club put out a statement on its official Twitter handle confirming that the entire first team and coaching staff have been placed on half salary following the team's dismal start to the season. While the author acknowledges that he is not privy to the terms of Plateau United players' contract, the reports around this development suggest that the club is invoking a clause in the employment contract which empowers it '**to sack, suspend or deduct the salaries of the players in the event of poor performance"**. If this hypothesis is correct, it is pertinent to briefly analyze the propriety of this move in the light of the prevailing labour and sports jurisprudence. In the first place, standard employment law practice does not support the unilateral reduction of players' salaries. It is common to insert performance-related bonuses in players' and managers' employment contracts which entitle the players and managers to receive a liquidated payment as bonuses for promotion or attaining a major milestone like winning the title. Conversely, another performance-related clause could entitle the club to reduce the wages and salaries of the coaching and playing staff upon the team's failure to gain promotion and/or relegation to a lower tier of the football league.

This point is illustrated by the case of ***Manchester City Football Club Plc v Royle***[10] the case concerned the interpretation of ambiguous expressions in a liquidated damages clause. This provided for different termination payments to be made to the manager depending on whether the club was in the Premier League or the EFL Championship at the date upon which his employment was terminated. The manager had been dismissed following the conclusion of the 2000/01 season after the club had completed its fixtures and been relegated but before the full season had ended. When the club's relegation from the Premier

[10] (2005) ECWA Civ 195

League was confirmed, the manager was paid compensation on the basis that he was a First Division manager. He contended that he was still a Premier League manager and was therefore entitled to a higher sum in liquidated damages. The manager succeeded in the High Court, but the Court of Appeal overturned the ruling, holding that, for the purposes of determining the appropriate rate of liquidated damages, the club was a First Division club with the consequence that the lower rate was payable. Part of the considerations by the club was the fact that having been relegated from the Premier League, the club was forced to relinquish its shares in the Premier League and was therefore obliged to pay the liquidated damages payable by a club in the Championship.

A performance-related clause that entitles the club to reduce the salaries of the coaching and playing staff after just a few games in the season is not only an anomaly but unduly punitive and may well be considered so by the court once a robust challenge is put up by the affected coaching and playing staff. Secondly, a performance-related clause that seeks to reduce the staff's salaries is not one of the standard clauses required in form 7 in the appendices to the NPFL framework Rules even though the parties are always at liberty to agree to insert one. The players may therefore contend that a performance-related clause that entitles the club to unilaterally reduce the staff's salaries as a result of the team's dismal form in the league before the conclusion of the league season is a violation of the minimum wage provisions of the NPFL Rules (where the reduction is below the approved minimum wage of **N150, 000. 00**). Ultimately, the strongest wicket to challenge this practice is by invoking the 'The ILO Decent Work Agenda' and the NICN's[11] 'participatory democracy' on the grounds that it would be unjust to make material changes to the terms of their employment contract without recourse to the employee.

As a postscript, poorly drafted performance-related clauses like the one just analyzed are not only bad for the clubs but the league as well. It makes a mockery of our claims to commercializing the football league and ultimately, stifles investment in the league. The NPFL therefore needs to rein in the clubs and ensure that such over-reaching clauses do not find their way in professional football contracts. The playing and coaching staff need to engage the services of lawyers to review every employment contract given to them to sign. The clubs on their part should engage the services of in-house counsel and external solicitors who would review and make appropriate recommendations on draft employment contracts prepared by the clubs to ensure the contract conforms with international best practices and prevailing labour jurisprudence.

[11] The National Industrial Court of Nigeria

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